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Choice of law for void contracts and their restitutionary aftermath: The putative governing law of the contract

Adeline CHONG
Singapore Management University, adelinechong@smu.edu.sg

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CHOICE OF LAW FOR VOID CONTRACTS AND THEIR RESTITUTIONARY AFTERMATH : THE PUTATIVE GOVERNING LAW OF THE CONTRACT

ADELINE CHONG *

I. INTRODUCTION

Void contracts are an oxymoron. They are 'contracts' which do not exist; in other words, 'contracts' which are, in fact, not contracts at all. Void contracts give rise to some of the most demanding issues of choice of law as they yield logically intractable problems which have to be resolved by reference to putative factors and concepts.

There are two parts of the equation when looking at choice of law for void contracts : first, establishing voidness; and secondly, the aftermath of voidness. The first initial question of which law determines whether a contract is void is generally answered by the putative governing law of the contract.[1] Once a contract is adjudged void, a claim that may be pursued in its aftermath is a personal unjust enrichment claim. The general choice of law rule in this area is also the putative governing law of the contract.[2] Thus, the concept of the putative governing law of the contract plays a central role in both parts of the equation where void contracts are concerned.

This paper will examine issues surrounding the concept of the putative governing law of the contract by studying its role in establishing a void contract and personal unjust enrichment claims arising in the aftermath of voidness. In particular, the use of the concept, how such a law is

* Lecturer in Law, University of Nottingham. I would like to thank Prof J Harris, Prof A Simester and Prof J Fawcett for helpful comments on earlier versions of this paper. All errors remain my own.

[1] Article 8(1) of the Rome Convention on the Law Applicable to Contractual Obligations (hereafter the Rome Convention), enacted into English law by the Contracts (Applicable Law) Act 1990; *Albeko Schumaschinen v The Kamborian Shoe Machine Co* (1961) 111 LJ 519. According to P Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford 1999) 84, the putative governing law approach is adopted in 'virtually all legal systems'.

[2] Rule 230(2)(a) in L Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London : Sweet & Maxwell) (14th edn, 2006); Commission (EC), 'Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II")' COM (2006) 83 final, 21 February 2006, Article 10(1).

and should be identified, and the justification for the pivotal role that is delegated to it despite its inherent illogicality, will be studied.

II. THE ROLE OF THE PUTATIVE GOVERNING LAW OF THE CONTRACT IN DETERMINING THE VOIDNESS OF A CONTRACT

(A) An overview

Questions arising from a contract, such as whether the parties have fulfilled their mutual obligations, or the interpretation of certain terms used in the contract, are referred to the governing law of the contract. However, when the very question is the validity of the contract itself, there can apparently be no governing law of the contract unless and until the contract is pronounced valid. This classic conflicts conundrum is resolved by recourse to the concept of the putative governing law of the contract. The choice of law solution here is to apply the law which would have governed the contract if it were valid, to determine whether the contract is valid.

Unless the governing law of the contract can be said to be separable from the contract,[3] the illogicality of this approach is obvious : one is 'seeking to establish something by first presuming it to be in existence'.[4] This approach has been variously condemned as displacing carts and horses,[5] being a 'bootstraps' rule,[6] and a confusing concept.[7] Despite these obvious truisms,

[3] An argument that is considered by Nygh (n 1) 84-86; AJE Jaffey, 'Offer and Acceptance and Related Questions in the English Conflict of Laws' (1975) 24 ICLQ 603; J Harris, 'Does Choice of Law Make Any Sense?' (2004) 57 Curr Leg Prob 305, 318-319; J Bird, 'Choice of Law' in F Rose (ed), *Restitution and the Conflict of Laws* (Mansfield Press, Oxford 1995) 125; P Brereton, 'Restitution and Contract' in F Rose (ed), *Restitution and the Conflict of Laws* 162.
[4] A Briggs, 'The Formation of International Contracts' [1990] LMCLQ 192, 198.
[5] Harris (n 3) 317.
[6] P Kaye, *The New Private International Law of Contract of the European Community : Implementation of the EEC's Contractual Obligations Convention in England and Wales under the Contracts (Applicable Law) Act 1990* (Dartmouth Publishing, Aldershot 1993) 270-274.
[7] *Mackender v Feldia* [1967] 2 QB 590 (CA) 602 (Diplock LJ).

practical considerations make application of the putative governing law a desirable option.[8] It breaks the vicious circle of, on the one hand, not being able to identify the governing law of the contract before a contract is deemed to exist; and, on the other hand, not being able to affirm a contract's existence until a governing law is identified. It is a clear-cut rule which promotes business efficacy.[9] It is also convenient to have the same choice of law rule applying whether or not a contract has been created.[10]

These pragmatic considerations have entrenched the putative governing law concept in English law. Article 8(1) of the Rome Convention states that : 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.'[11] Furthermore, Article 3(4) goes on to state that the existence and validity of the consent of the parties as to the choice of the applicable law shall also be determined according to the putative applicable law.[12]

There is also support for application of the putative governing law prior to the Rome Convention. In *Albeko Schumaschinen v The Kamborian Shoe Machine Co*,[13] an English offeror posted an offer to a Swiss offeree concerning appointment of the latter as the former's agent. The latter claimed that he had posted an acceptance though the English offeror never received it. Under English law, this constituted a valid acceptance, while under Swiss law it did not. Salmon J found on evidence that it was not proven that the letter of acceptance was posted and thus by both English and Swiss law no contract was created. However, his Lordship went on to discuss what

[8] 'The justification for that is not logic, but pragmatism' : Nygh (n 1) 95.
[9] PM North and JJ Fawcett, *Cheshire and North's Private International Law* (13th edn Butterworths, London 1999) 588.
[10] *Cf* Briggs (n 4) 198 (footnote 20).
[11] M Giuliano and P Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' OJ 1980 C282, 28 (hereafter the Giuliano-Lagarde Report), make it clear that this article is intended to apply to questions of formation of the contract. According to section 3(3)(a) of the Contracts (Applicable Law) Act 1990, the Giuliano-Lagarde Report 'may be considered in ascertaining the meaning or effect of any provision' of the Convention.
[12] Thereby being 'almost a "double-bootstraps" rule' : Kaye (n 6) 272. Both Articles 8(1) and 3(4) are subject to Article 8(2), on which, see section II(D)iii.
[13] (1961) 111 LJ 519. For criticisms of this case, see AJE Jaffey, *Topics in Choice of Law* (The British Institute of International and Comparative Law, London 1996) 67-68.

would have happened if the Swiss offeree had posted the acceptance. His Lordship held, *obiter*, that as the offer was communicated in Switzerland and the contract of agency was to be performed there, the proper law of the contract was Swiss law and thus no contract would have been formed.[14]

(B) Problems with application of the putative governing law

There is much to be said for not exaggerating the importance of logical solutions to legal conundrums. While the pursuit of intellectually logical solutions is commendable, this must never be at the expense of legal certainty. Therefore, use of the concept of the putative governing law of the contract in establishing voidness should not be anathema. However, problems do arise. These problems do not stem from reliance on the concept itself, but rather, how the concept is applied in practice. There is a distinct lack of sophistry as to how the putative governing law is identified. For example, if there is a choice of law clause in the disputed contract, the combined effect of Article 8(1) and Article 3(4) is that the law specified in the clause is straightforwardly identified as being the putative governing law. In *The Lankya Abbaya*,[15] the German *Bundesgerichtshof* held that the validity of a choice of law clause for Sri Lankan law, which was alleged by the plaintiff to be ineffective because it was illegible, was to be determined in accordance with Sri Lankan law.[16] If reference is made in the disputed contract to certain Articles in the French Civil Code, the putative implied governing law of the contract would be French law without further question.[17] The most controversial situation would be where there is no express or implied choice

[14] See also *The Parouth* [1982] Lloyd 's Rep 351; *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548; *Union Transport Plc v Continental Lines SA* [1992] 1 WLR 15 (HL).
[15] BGH December 15, 1986, [1988] I Prax 26; cited by R Plender and M Wilderspin, *The European Contracts Convention : The Rome Convention on Choice of Law for Contracts* (2nd edn Sweet & Maxwell, London 2001) 206 (para 10.03).
[16] However, the existence of an agreement was not disputed in this case.
[17] See the Giuliano-Lagarde Report (n 11) 17 for a list of other possible indications of an implied choice of law for the purposes of the Rome Convention.

of law. In these situations, the governing law is the law of closest connection.[18] Under the common law, the law of closest connection is determined by weighing connecting factors such as the place of contracting, the places of residence or business of the parties, the nature and subject matter of the contract, and the place of performance of the contract.[19] These are factors which can only be construed by looking at the alleged terms in an alleged contract. The Rome Convention presumes that the law of closest connection is the law of habitual residence of the characteristic performer of the contract;[20] but again, this cannot be determined until one looks at the terms of the purported contract.[21]

Therefore, whether the parties have allegedly made an express or implied choice of law or made no choice at all, no attempt is made to identify the putative governing law of the contract on a principled basis. Any alleged express or implied choice, or law of closest connection derived from alleged terms, will straightforwardly be identified as the putative governing law of the contract. The problems with this approach can be set out as follows.

The lack of thought that goes into identifying the putative governing law of the contract favours the party who alleges validity. As Jaffey has pointed out, why should the law of country A decide whether the parties had agreed on a contract merely because X claims that there was an

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[18] Article 4 of the Rome Convention; *Bonython v Commonwealth of Australia* [1951] AC 201 (PC) 219.
[19] *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52 (CA) 91, aff'd [1961] AC 1007 (HL).
[20] Article 4(2). The characteristic performer of a bilateral contract is the party who carries out performance for which payment is due : Giuliano-Lagarde Report (n 11) 20. If the contract is entered into in the course of the characteristic performer's trade or profession, Article 4(2) goes on to provide that the country of closest connection shall be the country in which the principal place of business, or the place of business in which performance is to be effected under the terms of the contract, is situated.
[21] The presumptions are rebuttable in accordance with Article 4(5) if it appears from the circumstances as a whole that the contract is more closely connected with another country. See *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep.87; *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019, [2002] CLC 533; *Kenburn Waste Management Ltd v Bergmann* [2002] EWCA Civ 98, [2002] CLC 644. Plans are ongoing to convert the Rome Convention into a Regulation (commonly known as the proposed Rome I Regulation). Under the current draft of the proposed Rome I Regulation, the series of presumptions indicating the law of closest connection have been replaced by fixed rules; see the draft Article 4 : Commission (EC), 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)' COM (2005) 650 final, 15 December 2005. The UK has indicated that it is opting out of the negotiations over the proposed Rome I Regulation.

agreement governed by the law of country A, while Y denies it?[22] Furthermore, the danger of the party who wishes to maintain the existence of the contract manipulating the terms of the alleged agreement so as to lead to a favourable law and thus favourable result is ever present.[23] Even if this was not the case, it could be said that the issue is much deeper and goes towards the principle of autonomy of parties in the contractual sphere. Why should a party have a law foisted upon him with which he did not agree?[24]

In addition, another area for which a straightforward application of the putative governing law does not cater is the situation where there are conflicting terms, or what is commonly referred to as a 'battle of forms' situation under English domestic law. If A makes an offer to B with a choice of law clause for Ruritanian law and B replies with a counter-offer with a choice of law clause for Utopian law, which law should be applied to determine whether a contract has been concluded? There are two putatively governing laws present.[25]

Another criticism that can be made against a straightforward application of the putative governing law can be illustrated by reference to the facts of *Albeko*.[26] On the alternative scenario that the Swiss offeree had posted a letter of acceptance, Swiss law would have been deemed the proper law and the alleged contract would have been adjudged void. This means that strictly speaking, Swiss law should never have been applied in the first place; in which case, should the validity of the contract be examined all over again on the basis that Swiss law is no longer putatively applicable?[27] Since the putative governing law approach means applying the law which

[22] (N 13) 63.
[23] Kaye (n 6) 274.
[24] Although presumably a party denying agreement would not protest against application of a law that he did not agree to, but which would ultimately hold the contract void.
[25] Both the authors of *Dicey, Morris and Collins* (n 2) 1578 (para 32-103), 1602 (para 32-165) and Nygh (n 1) 96, suggest the application of the objective proper law (ignoring any choice of law clauses). This was adopted in *Evialis SA v SIAT* [2003] EWHC 863 (Comm), [2003] 2 Lloyd's Rep 377 [38]. However, English and Australian courts have on the whole tended to apply the *lex fori* : *Dicey, Morris and Collins* 1602 (para 32-164). See *The Heidberg* [1994] 2 Lloyd's Rep 287, 308. *Cf* G Danneman, 'The "Battle of Forms" and the Conflict of Laws' in F Rose (ed), *Lex Mercatoria : Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, London 2000) 210.
[26] Facts above, text to n 13.
[27] Harris (n 3) 317.

would apply if the contract is valid, the answer appears to be 'yes'. Swiss law would never find the contract valid. Thus, it is not the putative governing law. However, taken to its inexorable end, this would mean that the whole process of determining validity must commence over and over again until a law is applied that would give the result that the contract is valid,[28] unless of course no law would ever find that a contract has been created. In which case, this raises the question of just how many bites of the cherry should be offered to the person alleging the validity of the contract before holding that the contract is void.[29]

(C) When is a law the putative governing law?

It is clear that the putative governing law needs to be accorded some role in any solution which prizes pragmatism and certainty in determining voidness. However, if the putative governing law is the law which would be applicable *if* the contract is valid, why should one automatically assume that a choice expressed or implied from the putative contract, or law of closest connection of the putative contract, *is* the putative governing law?

There is a need for a preliminary stage whereby the putative governing law needs to be properly identified.[30] Essentially, what is required is a two-stage approach[31] which has as its aim the identification of what one may call a 'legitimate' putative governing law of the contract. There has to be an initial stage whereby the parties are found to have come to a *prima facie*

[28] *Cf* Jaffey (n 3) 609, who argues that offer and acceptance cases are not an area for the application of any presumption of validity. Lagarde, 'The Scope of the Applicable Law in the EEC Convention' in PM North (ed), *Contract Conflicts : The EEC Convention on the Law Applicable to Contractual Obligations – A Comparative Study* (North-Holland Publishing Co, Oxford 1982) 50, remarks that the Convention rejected such a presumption because it would have affected the predictability of the solution. Pre-Rome Convention however, there were some who supported a presumption in favour of the validity of the contract ie application of a law which would find the contract valid as opposed to void. See E Crawford, 'The Uses of Putativity and Negativity in the Conflict of Laws' (2005) 54 ICLQ 829, 849-850.

[29] The preferable solution is that once a contract has been adjudged void, that should be the end of the matter. No further law should be applied to try and make it valid.

[30] Harris (n 3) 317.

[31] A two-stage approach is also favoured by Briggs (n 4); Harris (n 3) 316-324; DF Libling, 'Formation of International Contracts' (1979) 42 MLR 169; Nygh (n 1) 92-98.

agreement according to what will be called here as a 'neutral' law before the concept of the putative governing law steps in. This 'neutral' law has the task of identifying the putative governing law and ascertaining that both parties have agreed to this law. Once this 'legitimate' putative governing law has been so identified, it can then be applied to test the validity of the contract under the second stage.

This scheme would counteract the problems identified above. It would preserve the scales of justice between the parties as the courts will not be initially taking the side of the party who is alleging validity. In addition, it would resolve a 'battle of forms' situation in that this neutral law would first decide whether the parties have come to an agreement and on which parties' terms. Having this preliminary stage would also get rid of the absurdity that arises when application of the putative governing law results in a void contract. This is because if a neutral law has decided that the parties have reached a *prima facie* agreement to a contract governed by Swiss law, one could be more confident that Swiss law *is* the putative governing law and accept its verdict that the contract is void.

(D) The preferred scheme : the two-stage approach

i. Identification of the neutral law

Nygh suggests that the preliminary question of whether the parties had reached a *consensus ad idem* on a choice of law is a mere matter of fact.[32] This cannot be supported. Whether silence would be sufficient to constitute agreement with a unilateral proposal of a choice of law clearly involves application of a rule of law. The effect of, for example, mistake, on consent would also be a matter of law. Whether an acceptance that is lost in the post is effective is another matter concerning a proposition of law. The preliminary stage of whether the parties have reached *prima*

[32] N 1, 93-94.

facie agreement cannot be considered as a mere factual issue but is a question that needs to be answered by a *law*. As North notes, 'agreement' consists of legal as well as factual elements.[33]

The three possible laws that could play this neutral role at the preliminary stage are the objectively determined governing law of the contract, the *lex locus transactionis* and the *lex fori*. The suitability of each will now be examined in turn.

(a) The objectively determined governing law of the contract

This would be the law of closest connection to the alleged contract. There are two options if the parties have allegedly chosen a governing law. One is to take into account the alleged choice of law clause along with the other alleged terms but to accord it no special weight. As Lord Denning has put it, the parties' intention is 'only one of the factors to be taken into account.'[34] The other method is to apply the law which would be applicable in the absence of an express or implied choice of law. In other words, one would ignore the alleged choice of law.[35]

Both methods should be rejected. Whether one follows the common law weighing of all factors method or the Rome Convention's presumptions, one should consider the position of the party who denies that he agreed to a choice of law and a contract. In both versions, the court will be looking at the alleged terms in the alleged contract in their bid to discover the law of closest connection, that is, the very terms to which that party says that he did not agree. In doing so, the

[33] *Private International Law Problems in Common Law Jurisdictions* (Nijhoff Publishers, Dordrecht 1993), 116.
[34] *Boissevain v Weil* [1949] 1 KB 482 (CA) 491.
[35] L Collins, 'Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law' (1976) 25 ICLQ 35, 53. Application of the putative objective proper law of the contract which is derived without reference to any alleged choice of law clause also seems to be supported by *Dicey and Morris* and Cheshire pre-Rome Convention. See JHC Morris, *Dicey and Morris on the Conflict of Laws* (9th edn Stevens & Sons Ltd, London 1973) 764; GC Cheshire, *Private International Law* (7th edn Butterworths, London 1965) 203.

court is assuming that the terms are valid. No neutrality can be offered by applying the objectively determined putative governing law.[36]

(b) *Lex locus transactionis*

According to Garner, the existence and terms of a contract should be determined by the law of the country that has the most real and substantial connection with the *transaction* alleged to give rise to the contract.[37] Garner recognises that looking at alleged terms in an alleged contract is patently unfair on the party denying the existence of both terms and contract. Instead, he suggests that the only factors that can be legitimately looked at would be factors such as the place where the relevant acts[38] of the parties took place, and the residence or place of business of the parties; that is, factors whose legitimacy do not hinge on a purported contract.[39]

The great strength of Garner's model is that it removes the favouring of the party who alleges that the clause and contract is valid. Nevertheless, he acknowledges that a weakness of his theory is that the *locus contractus* or rather, the *locus transactionis*, could be entirely fortuitous. But, as he argues : 'it nevertheless might be a relevant "connecting factor" or "point of contact" indicating the country with which the transaction has the most real and substantial connection.'[40]

However, the greater problem with his theory is the scarcity of factors which the courts may look at to discover the law of closest connection. Other than those he mentions, that is, the place of transaction and the residence or place of business of the parties, it is difficult to think of other factors which could be looked at without prejudicing the party alleging invalidity. What if

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[36] *Cf* A Thompson, 'A Different Approach to Choice of Law in Contract' (1980) 43 *MLR* 650.
[37] 'Formation of International Contracts - Finding the Right Choice of Law Rule' (1989) 63 *ALJ* 751.
[38] Relevant acts being presumably making the offer, negotiations, if any, and the purported acceptance.
[39] Garner (n 37) 759-760, cites Deane J's judgment in *Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] 165 CLR 197 (High Court of Australia) 255, as support. His Lordship had held that the question whether the transaction gave rise to a binding agreement between the parties should be determined in accordance with the law of New South Wales, which was the place where the parties' actions and transactions led up to the contract.
[40] N 37, 760.

the transaction took place in country A, one party is from country B, and the other party is from country C? To which factor should the court give predominant weight? A case could be made that the place of the transaction should be the most important factor, but this would be akin to resurrecting the now discredited *locus contractus* rule with all its problems.[41] In addition, as Garner himself concedes, it would be difficult to apply this rule if the relevant acts of the parties took place in more than one country.[42]

Therefore, Garner's model, whilst admirable in its attempt to achieve a balance of fairness between the parties, would not be altogether practicable in reality.

(c) *Lex fori*

The *lex fori* has the best credentials to decide upon the question of whether the parties have reached a *prima facie* agreement. It is however important to emphasise again that what is advocated here is a two-stage approach.[43] First, the *lex fori* determines whether there is a good arguable case[44] that the parties have reached an agreement; if this first stage is answered affirmatively, then this *prima facie* agreement would have a putative governing law. Secondly, this 'legitimate' putative governing law is then applied to determine the contract's voidness. This approach differs from the suggestion that the *lex fori* should alone decide the validity of the

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[41] Reliance on the presumption that the proper law of the contract is synonymous with the *lex loci contractus* or the *lex loci solutionis* have been discarded : L Collins (gen ed), *Dicey and Morris on the Conflict of Laws* (11th edn Stevens, London 1987) 1192 (footnote 92); E Sykes and MC Pryles, *Australian Private International Law* (3rd edn Law Book Co, Sydney 1991) 608.

[42] N 37, 760.

[43] A two-stage approach with a role for the *lex fori*, albeit with varying details, is also favoured by Briggs (n 4); Harris (n 3) 316-324; Libling (n 31); Nygh (n 1) 92-98.

[44] *Cf* Harris, 'Contractual Freedom in the Conflict of Laws' (2000) 2 OJLS 247, 254 (footnote 38) and n 3, 320 (footnote 50), who favours the higher threshold of 'balance of probabilities'. However, it is submitted that the lower standard of 'a good arguable case' is more practical, bearing in mind that this is merely a preliminary stage. It is also suggested that it is by no means clear that the imposition of this lower standard would significantly affect the level of protection offered to the party alleging invalidity. Furthermore, the standard of 'a good arguable case' as to whether a contract exists or not is sufficient for the purpose of establishing jurisdiction under the Order 11 context : *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.

contract, a suggestion which is one of the more popular alternative solutions to the conundrum of which law determines whether a contract is void.[45] Under this latter approach, the *lex fori* determines the existence of a contract and identifies the contract's proper law.[46] However, advocating such a large-scale role for the *lex fori* is unnecessarily parochial in nature. In addition, it is unclear why the *lex fori* should be applied to deem a contract void[47] as it may have little connection with the transaction which gave rise to the purported contract : 'the accident of the forum should not be decisive on so fundamental an issue of conflict of laws as the existence and validity of a contract…'.[48] Furthermore, it raises the problem of forum shopping and that the parties would litigate at the jurisdictional stage to avoid an unfavourable law being applied to the substantive case.[49]

The last point about forum shopping could be argued also to pose a problem under the two-stage approach. However, it is important to realise the limited extent of the role that is accorded to the *lex fori* under the two-stage approach. The *lex fori* would have responsibility only over the question of whether a *prima facie* agreement exists at all. In other words, its role is confined to the identification of a 'legitimate' putative governing law of the contract, not the legal validity of the alleged contract itself. Thus, fears of forum shopping would be exaggerated.[50]

ii. The most appropriate neutral law to determine the existence of a *prima facie* agreement : the *lex fori*

[45] Judicial *obiter dicta* which suggest approval of this approach include *Mackender v Feldia* (n 7) 603 (Diplock LJ); *Oceanic Sun Line* (n 39) 225 (Brennan J), 260-261 (Gaudron J). In the latter case, despite the fact that both judges referred to Libling (n 31), who advocates a two-stage approach, their *dicta* do not indicate acceptance of the more subtle two-stage approach.
[46] As opposed to identifying the *putative* governing law of the *prima facie* agreement, which is the role advocated for the *lex fori* here.
[47] This is as opposed to the legitimate application of the *lex fori*'s public policy and mandatory rules to strike down a contract.
[48] *The Heidberg* (n 25) 307 (Judge Diamond QC).
[49] North (n 33) 116. Attempts to raise the applicable law at the jurisdiction stage would be firmly rebuffed : *Benincasa v Dentalkit* Case 269/95 [1997] ECR I-3767.
[50] See also text to nn 54-57 below.

(a) Justifications for applying the *lex fori*

The justifications for delegating this question to the *lex fori* can be set out as follows. When it is alleged that a contract is in existence, there can be no applicable law until the assertion is borne out. Once so proven, any questions arising from the contract are rightfully the domain of the applicable law. However, pending a finding that a contract is in existence, it is difficult to see what other law, other than the *lex fori*, has the best claim to determine any questions that may arise, such as whether there has been agreement on a choice of law clause contained in the alleged contract. Such a question involves the identification of a connecting factor and 'the interpretation of a connecting factor is always a matter exclusively for English law as the *lex fori*. This is elementary, axiomatic, and could not be otherwise.'[51]

Applying the *lex fori* can be justified jurisprudentially. Where a contract is only alleged to exist, the parties' purported intention is but one factor which the court may take into account. Otherwise, determination of the governing law of the alleged contract is a legal matter of which the court is the final arbiter. As an organ of the state, the court cannot be bound by or have its jurisdiction ousted by the parties' intention or purported intention.[52] This still stands even though, in reality, the court clearly chooses to be so bound. This also links up with the idea that it is the *lex fori* which allows the parties to choose the applicable law in the first place; thus the governing law originates from the *lex fori*[53] and it is only right that recourse is had to the *lex fori* when there are doubts as to what that governing law is or even whether a governing law exists at all.

In addition, operation of the jurisdictional rules should ensure that England is the most appropriate forum for the trial of the action. *Spiliada Maritime Corpn v Cansulex Ltd*[54] established that a stay of proceedings which have been started as of right in England should only

[51] *Collier* [1989] All ER Rev 61.
[52] Kaye (n 6) 273.
[53] Briggs (n 4) 198.
[54] [1987] AC 460 (HL).

be granted on the ground of *forum non conveniens*. This infers that application of English law as the *lex fori* would be fair as it has already been established that England is the natural forum for the action. It is suggested that post-*Spiliada*, the case for application of the *lex fori* at this preliminary stage is strong. Admittedly, under the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,[55] defendants may be sued in England solely on the basis of their domicile even if the claim has no other connections with England.[56] However, the Regulation does attempt to confer jurisdictional competence on courts of Member States which have a substantial connection with the case,[57] so that a defendant could be sued in a forum with a strong connection to the claim.

Moreover, if the parties do not or are unable to prove that a foreign law is applicable, the *lex fori* is always applied.[58] Other advantages would be expediency and simplicity : judges are obviously most familiar with their own domestic law.[59]

(b) Judicial authority for applying the *lex fori*

Most of the authorities in support of a role for the *lex fori* advocate a wholesale application of the *lex fori* to the question of whether a contract exists, instead of a more subtle two-stage approach.[60] The closest that one may get to authority for what is proposed here is *The TS Havprins*.[61]

This case involved an application for a stay of proceedings which had been commenced pursuant to leave given to serve out of jurisdiction in accordance with Order 11 of the Rules of

[55] Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12 (16.01.2001).
[56] Article 2.
[57] Notably, Articles 5 and 6.
[58] *Warner Bros v Nelson* [1937] 1 KB 209; *The Marinero* [1955] P 68, [1955] 2 WLR 607 (PDAD).
[59] Nygh (n 1) 93.
[60] *Mackender v Feldia* (n 7) 603 (Diplock LJ); *Oceanic Sun Line* (n 39) 225 (Brennan J), 260-261 (Gaudron J).
[61] [1983] 2 Lloyd's Rep 356.

the Supreme Court.[62] Staughton J held that English law as the *lex fori* was to be applied to determine whether there was a contract between the parties and whether it was governed by English law, there being a disputed clause in favour of English law.[63] There a couple of things to note about this decision. First, given that the choice of law clause provided for application of English law, it could be said that application of English law to determine the existence of the agreement to the clause was in line with the straightforward application of the putative governing law approach. However, Staughton J stressed that determination of a connecting factor, such as a purported choice of law, is always for the *lex fori*[64] and there is no doubt that his Lordship applied English law as the *lex fori* to decide whether such a choice was made.

Secondly and importantly, Staughton J appeared to be proposing a two-stage approach to determination of the governing law. His Lordship stated that :

> '… if I hold that there was a contract between the parties [according to English law] … I might in theory still conceivably reach the conclusion that it was governed by Norwegian law. In such circumstances … when it came to the trial of the action, it would be necessary to re-examine in accordance with Norwegian law, as the putative proper law, whether there was a contract between the parties.'[65]

The difference between this and the scheme that is proposed in this paper is, of course, in allocating that initial role for English law as the *lex fori*, Staughton J was dealing with a jurisdictional issue as this was an Order 11 case primarily concerned with the question of whether the English court had jurisdiction. The reference to Norwegian law re-examining the question of the contract's validity is a question of the applicable law arising at the choice of law stage once it has been established that the English court has jurisdiction. Nevertheless, although the roles

[62] Now CPR 6.20. See Briggs (n 4) 202 for the argument that Order 11 cases are wholly unsuitable as a line of authority for choice of law questions.
[63] There was ultimately no dispute that a contract was made but rather a dispute as to the time it was made, the question of whether the choice of law clause was agreed upon hinging on the latter issue. It is clear that, should the validity of the contract have been in issue, Staughton J would have applied the *lex fori* to decide that issue as well.
[64] N 51, 358.
[65] *Ibid*, 359.

advocated for the *lex fori* and the putative governing law are split between the jurisdictional and choice of law stages in Staughton J's *dictum*, if one takes the *dictum* as a whole, there is little practical difference between Staughton J's approach and the approach advocated in this paper.

iii. The two-stage approach in comparison with Article 8 of the Rome Convention

It is by no means obvious that where the existence of a contract is in dispute, the law specified in an alleged clause of the disputed contract, or alleged implied choice or law of closest connection derived from disputed terms, should inevitably be the 'putative governing' law.[66] As long as one accepts that the determination of connecting factors is for the *lex fori*,[67] one must also arguably accept that it is within the rights of the *lex fori* to insist on being satisfied that there is a *prima facie* agreement before a 'legitimate' putative governing law can be identified. For example, if there is a choice of law clause for Ruritanian law in a disputed contract, the *lex fori* must first be satisfied that there is a good arguable case of consensus on the choice for Ruritanian law before Ruritanian law can be deemed as the putative governing law of the contract. This stage can be seen as part of the process of determining the connecting factor of choice. Once the putative governing law has been so identified, then and only then should Article 3(4) and Article 8(1) of the Rome Convention be operative so that Ruritanian law is applied to determine whether the contract is valid.

However, this does not appear to be the approach taken by the Rome Convention. It has been seen that courts assume that if there is a disputed choice of law clause, the law pin-pointed by that clause is automatically deemed as the putative governing law for the purposes of Article

[66] *Cf* Collins (n 35) 53; DG Pierce, 'Post-Formation Choice of Law in Contract' (1987) 50 MLR 176, 179-183.
[67] Unless the argument is that the *lex fori* chose to adopt the Rome Convention rules and requirements for determining connecting factors.

8(1).[68] One may argue that this straightforward approach does no harm as the balance of fairness between the parties is preserved under the Rome Convention by Article 8(2). Article 8(2) enables a party to rely upon the law of his habitual residence to establish that he did not consent if it would not be reasonable to determine the effect of his conduct in accordance with the putative governing law.[69] This proviso was formulated to cover the situation where silence by one party as to the formation of the contract would be construed as consent by the putative governing law but not by that party's law of habitual residence; it was thought to be unfair to hold the party bound under these circumstances.[70] Therefore it could be said that there is no need for the *lex fori* playing a preliminary role in determining whether the parties have reached a good arguable case of agreement.

Nevertheless, under the two-stage scheme, the parties start out even-handedly, whereas the function of Article 8(2) is akin to imposing retrospective fair-play between the parties when one party denies validity. Of the two, it is submitted that the former is preferable as it is far better to have a level playing field at the outset. In addition, the two-stage approach resolves the problems mentioned above : the 'battle of forms' situation and the absurdity that arises if what is automatically deemed as being the putative governing law finds the contract void. Furthermore, one could not be sure that the law of habitual residence of the party who denies validity will protect him in all cases; it appears that a high burden of proof will be imposed on the person wishing to invoke Article 8(2).[71] Hence, it is suggested that the two-stage scheme is preferable to the position adopted under the Rome Convention.

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[68] *The Lankya Abbaya* (n 15).
[69] See also Article 10(3) of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986.
[70] However, Article 8(2) is not limited to silence; the wording is wide enough to cover also action by the party in question : Giuliano-Lagarde Report (n 11) 28. Thus, Article 8(2) would also offer protection to a party, Y, whose acceptance of an offer gets lost in the post; Y being bound by the law specified in the choice of law clause in the offer but not bound by the law of his social and legal environment : example given by Lagarde (n 28) 50.
[71] *Egon Oldendorff v Libera Corporation (No. 1)* [1995] 2 Lloyd's Rep 64 (QBD Comm Crt).

(E) Conclusion to Section II

Logically 'pure' solutions are hard to find when the subject matter itself is a contradiction in terms. Instead, pragmatism comes to the fore when one attempts to formulate a choice of law rule for establishing voidness. This has led to the putative governing law concept. However, too little attention has been paid as to what exactly constitutes a putative governing law. There is a need for a prior stage whereby a neutral law would identify a 'legitimate' putative governing law of the contract. The *lex fori* is the law that is best suited to play this neutral role : its role can be justified logically and jurisprudentially as well as for the reasons of justice between the parties and expediency. Once the putative governing law has been so identified, it would be a law which one could confidently apply without forsaking the logical foundations for its use. It will not be a mere badge of convenience, but will function as a proper tool to resolve conflicts problems.

III. THE ROLE OF THE PUTATIVE GOVERNING LAW IN PERSONAL UNJUST ENRICHMENT CLAIMS ARISING IN THE AFTERMATH OF VOIDNESS

The concept of the putative governing law of the contract also plays a big role in relation to a personal unjust enrichment claim that may arise in the aftermath of a void contract.[72] This section will look at the criticisms, justifications and authorities for the continued role of the putative governing law after the contract has been adjudged void. Another issue that will be looked at is whether the putative governing law should still provide the choice of law rule if another law strikes down the contract.

[72] Of course, if one party denies agreement, only a law that is identified as being putatively applicable in accordance with the two-stage approach as set out in section II has the necessary credibility to go on to govern the aftermath of voidness. However, if the *lex fori* determines that no consensus exists such that a principled putative governing law of the contract cannot be identified, then there is much to be said for a default rule in favour of the law of the place of enrichment to govern the restitutionary obligation. This issue is, however, outside the scope of this paper.

(A) Criticisms against application of the putative governing law

The criticism of illogicality which dogged the use of the putative governing law concept in relation to establishing voidness surfaces here too[73] and indeed, has been argued to apply *a fortiori* in relation to the restitutionary aftermath of voidness.[74] This is because application of the putative governing law to determine the validity of a contract occurs before the validity or voidness of the contract is established; in which case it could be argued that such application is more intelligible than applying the putative governing law once one knows that the contract is definitely a nullity.[75] Bird counters that 'this is just a question of degree'[76] and, indeed, the important point is that while the concept of the putative governing law is manifestly not 'logical', it is a recognised tool in resolving intractable conflicts problems. As Zweigert and Müller-Gindullis put it : 'it has always proved a mistake to employ in legal science categories of thought developed in the natural sciences.'[77]

In addition to the criticism of illogicality, another criticism stems from the contention that the restitutionary obligation is an independent obligation which does not arise from the contract itself but is imposed by law. This line of argument goes on to reason that, therefore, application of

[73] J Blaikie, 'Unjust Enrichment in the Conflict of Laws' [1984] *Jur Rev* 112, 127; G Williams, *Law Reform (Frustrated Contracts) Act, 1943* (Stevens, London 1944) 19-20 (in the context of restitution following frustration); K Lipstein in HC Gutteridge and K Lipstein, 'Conflict of Law in Matters of Unjustifiable Enrichment' (1939/41) 7 CLJ 80, 86 (although by 1949, Lipstein appears to have changed his view when he acted as the author of the choice of law rule for quasi-contract in JHC Morris (ed), *Dicey's Conflict of Laws* (6th edn Stevens, London 1949), Rule 167 : as noted by Blaikie, 119 (footnote 37); Bird (n 3) 113 (footnote 291)).
[74] R Stevens, 'Conflict of Laws' in P Birks and F Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 344; Harris (n 3) 325.
[75] J Bird, 'Choice of Law and Restitution of Benefits Conferred Under a Void Contract' [1997] LMCLQ 182, 184.
[76] *Ibid.*
[77] 'Quasi Contract' in K Lipstein (ed), *International Encyclopaedia of Comparative Law, Vol. III* (Tubingen, The Hague 1974) 12 (para 22).

the putative governing law of the contract to the restitutionary aftermath undermines the independence of the claim.[78]

This argument 'misses the mark'[79] : the putative governing law of the contract is the preferred choice of law rule to govern the restitutionary consequences of a void contract not because such consequences are contractual in nature, but because the putative governing law happens to be, for the practical reasons that will be set out below, the best choice of law rule for unjust enrichment claims arising from void contracts. A backwards reasoning that the application of the law which would apply if the claim is contractual in nature implies that the restitutionary obligation is being subsumed under a contractual claim would be entirely misguided. One should not make the mistake of assuming that applying the putative governing law of the contract to an unjust enrichment claim regresses to the discredited implied contract reasoning.

A more valid criticism that could be made is that application of the putative governing law to the aftermath should not be sanctioned if the contract is set aside on grounds which impugn the parties' agreement to any choice of law clause.[80] For example, if English were the chosen law,[81] it is generally conceded that it would be inappropriate to apply the expressly chosen governing law of the contract when the contract is set aside on grounds such as fraud or duress.[82] The fraud or duress would also be operative with respect to the agreement as to the choice of law if the clause was agreed under the same circumstances as the main contract. The same is true of *non est factum*. Bird would also forbid application of the chosen law where the contract is void

[78] S Cohen, 'Quasi Contract and the Conflicts of Laws' (1956) 31 *LA Bar Bull* 71, 74; A Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 619; G Panagopoulos, *Restitution in Private International Law* (Hart Publishing, Oxford 2000)147, 263.
[79] JG Collier, 'The Draft Convention and Restitution or Quasi-Contract' in K Lipstein, *Harmonisation of Private International Law by the EEC* (Institute of Advanced Legal Studies, London 1978) 88.
[80] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 (CA) 724 (Hoffman LJ). If the ground of invalidity of the contract similarly impugns a choice of law clause, then it is suggested that the law of the place of enrichment should apply to govern the restitutionary obligation.
[81] The effect of the ground of invalidity of the contract on any choice of law clause is a choice of law question which must be answered by the putative governing law of the contract.
[82] *Dicey, Morris and Collins* (n 2) 1875 (para 34-024); Bird (n 75) 187; Panagopoulos (n 78) 145; Harris (n 3) 326. It should be noted that both these grounds merely render the contract voidable, not void, under English domestic law : E McKendrick, *Contract Law* (6th edn Palgrave Macmillan, Hampshire 2005) 286, 357.

because of a fundamental mistake, as 'there is no true meeting of minds … there is in fact no genuine attempt to enter into contractual relations.'[83] However, as *Dicey, Morris and Collins* point out, if the fundamental mistake relates to something such as a mistake regarding the subject-matter of the contract, there may be no objection to giving effect to the parties' choice of English law; their intentions as to the applicability of the chosen law to govern their contract and any consequences arising from its invalidity are unaffected by a mistake which does not directly relate to the choice of law clause itself.[84] Similarly, a choice of law clause in a contract which is void because of one party's incapacity should be considered to 'survive' the voidness as the choice remains essentially valid although some other factor (the incapacity) renders the contract void.[85]

(B) Practical justifications for application of the putative governing law

Unless the ground of voidness similarly impugns the putative governing law of the contract, practical justifications call for the proper law of the restitutionary obligation to be the putative governing law when an unjust enrichment claim is pursued in the aftermath of voidness. These justifications will now be set out.

First, in most circumstances, the putative governing law of the contract would be the law of closest connection to the unjust enrichment claim.[86] The enrichment takes place because it was intended or assumed that there was a valid legal relationship between the parties and, thus, any claim for restitution of the enrichment has its roots in this putative relationship. The conduct of the parties was based on the terms of the void contract and it is the void contract which is the basis upon which the transfer of assets takes place.[87] Lord Penrose has observed that :

[83] N 75, 187.
[84] N 2, 1875 (para 34-024). See also Harris (n 3) 326.
[85] *Cf* Stevens (n 74) 344.
[86] Zweigert and Müller-Gindullis (n 77) 7 (para 14).
[87] *Alaska Airlines v United Airlines* 902 F 2d 1400 (United States Court of Appeals, Ninth Circuit, 1990); Zweigert and Müller-Gindullis, *ibid.*; Collier (n 79) 88. *Cf* Blaikie (n 73) 127.

> 'at the very least the attempt of parties to make a contract governed by or putatively governed by a chosen system of law or by a system selected on conventional conflict principles, remains a reality irrespective of whether or not they succeed in that attempt, and in particular remained a reality at the date of the performance tendered.'[88]

Put differently, the contract exists still as a factual entity which can explain the nature of the parties' actions. Thus, the terms of the void contract may be referred to by the court in order to establish that the defendant has been enriched or to take the contractual price as an indication of the restitutionary measure that should be awarded to the claimant.[89]

Secondly, application of the putative governing law of the contract to a personal unjust enrichment claim would diminish the importance of the debate as to the proper characterisation of the claim or issue.[90] It would not matter whether the claim is characterised as being contractual or restitutionary as the same choice of law rule, that is, the putative governing law of the contract, would be applied. This is advantageous, as the boundary between contract and restitution sometimes may not be delineated clearly. For one, Zweigert and Müller-Gindullis state that some legal systems allow a contractual claim for restitution.[91] For another, it has been argued that rescission under English domestic law is not only a contractual remedy in the sense that it wipes away a contract, but also often a restitutionary remedy when benefits have been conferred under the contract in that it involves the restitution of those benefits.[92] Related to this is the idea that restitution arising out of a void contract is, in a sense, akin to a contractual remedy as it seeks to

[88] *Baring Brothers v Cunninghame District Council* [1997] CLC 108 (Court of Session : Outer House) 126. However, it should be noted that Lord Penrose, at 127, ultimately preferred a flexible choice of law rule in favour of the 'law of the country with which in the light of the whole facts and circumstances, the critical events have their closest and most real connection', under which the parties' attempts to enter into a contract will be relevant and material, but not determinative of what is the proper law of the restitutionary obligation.
[89] Bird (n 75) 185; Brereton (n 3) 145.
[90] *Cheshire and North* (n 9) 679; *Dicey, Morris and Collins* (n 2), 1873 (para 34-021); Bird (n 3) 123; Collier (n 79) 88; R Stevens, 'The Choice of Law Rules of Restitutionary Obligations' in F Rose (ed), *Restitution and the Conflict of Laws* (Mansfield Press, Oxford 1995) 194.
[91] N 77, 14 (para 27).
[92] Burrows (n 78) 56-60.

rectify an unwarranted situation arising from performance of a purported contract.[93] This idea is bolstered by the fact that the terms of the void contract remain relevant in determining whether and to what extent restitution should be ordered.[94] For example, the fact that the parties made an attempt, albeit a faulty one, to conclude a contract would be evidence that any performance rendered was intended to be remunerated. All this leads to a blurring of the division between restitution and contract which could mislead the court into wrongly characterising the claim. Therefore, a choice of law rule which sidesteps this problem has much to commend it.

Thirdly, the parties' legitimate expectations would be protected.[95] This is because parties would ordinarily expect the law they chose to govern their relationship, that is, the law governing the contract or purported contract, or law of closest connection in the absence of party choice, to include all claims arising out of that relationship.[96] Their expectations would normally extend to a restitutionary claim arising as a consequence of failure of that relationship as any shift of assets constituting the enrichment would have been based on the terms of the void contract. It is doubtful that the parties would distinguish between restitution and contract in this context, or even foresee where the divide between restitution and contract is, as : 'Restitution in the context of a bargain would be regarded as part of the law affecting the bargain.'[97] They may not have anticipated restitution when they agreed on a choice of law clause, but that is not the same as saying that the parties would not have anticipated the law they chose to govern their contract also to govern a restitutionary claim which arose out of their purported relationship.[98]

[93] J Bird, 'Bribes, Restitution and the Conflict of Laws' [1995] LMCLQ 198, 201; Bird (n 3) 124; Zweigert and Müller-Gindullis (n 77) 14 (para 27).
[94] Brereton (n 3) 162.
[95] Bird (n 3) 123; Brereton (n 3) 156; Stevens (n 90) 193-194.
[96] In *Dimskal Shipping Co SA v International Transport Workers' Federation (The Evia Luck)* [1992] 2 AC 152 (HL), the parties accepted that a restitutionary claim arising from a contract set aside for duress under the governing law of the contract, English law, was also to be governed by English law.
[97] Brereton (n 3) 156-157.
[98] *Cf* Bird (n 3) 126-127.

Fourthly, as the putative governing law is generally acknowledged to be the most appropriate choice of law rule to establish a contract's voidness,[99] the same law will govern both matters relating to establishing voidness and matters relating to the aftermath of voidness.[100] This has the advantage of the same law governing matters arising from a unitary factual situation, which is desirable for reasons of practicality and convenience,[101] in addition to ensuring logically consistent outcomes.

(C) Authorities

The UK entered into a reservation against Article 10(1)(e) of the Rome Convention which states that the consequences of nullity of a contract are to be governed by the applicable law of the contract, as determined under the Rome Convention.[102] The reservation was entered into on the grounds that the consequences of nullity belonged in the province of the law of restitution and not contract.[103] Be that as it may, it is still recognised that the putative governing law of the contract is the best choice of law option to govern unjust enrichment claims arising in the aftermath of voidness. *Dicey, Morris and Collins*'s Rule 230 states that :

> '(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
> (2) The proper law of the obligation is (*semble*) determined as follows :
> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; …'[104]

[99] Article 8(1) of the Rome Convention; Rule 206(1) of *Dicey, Morris and Collins* (n 2) 1598 (para 32R-154).
[100] Unless the contract was struck down by some law other than the putative governing law of the contract. This issue is discussed below; see section III(D).
[101] Zweigert and Müller-Gindullis (n 77) 14 (para 27); Collier (n 79) 88.
[102] Section 2(2) of the Contracts (Applicable Law) Act 1990.
[103] *Hansard* HL vol 513 cols 1258-1259, 1271.
[104] N 2, 1863 (para 34R-001).

The commentary makes it clear that Rule 230(2)(a) would cover instances of unjust enrichment claims arising from a void contract.[105]

In addition, Article 10(1) of the proposed EC Regulation on the Law Applicable to Non-Contractual Obligations, commonly known as the proposed Rome II Regulation,[106] provides that :

> 'If a non-contractual obligation arising out of unjust enrichment, …, concerns a relationship previously existing between the parties, such as a contract or a tort or delict …, which is closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.'

The *Explanatory Memorandum* which accompanied a previous draft of the proposed Rome II Regulation elaborates that the concept of a pre-existing relationship 'applies particularly to … void contracts.'[107]

Furthermore, § 221 of the *Restatement (Second) of Conflict of Laws* lists 'the place where a relationship between the parties was centered, provided that the receipt of the enrichment was substantially related to the relationship' as a contact which, 'as to most issues, is given the greatest weight in determining the state of the applicable law.'[108] The authors of *Scoles and Hay* interpret § 221 as covering both actual and intended contractual relationships,[109] and thus, a putative governing law of the contract would be given effect under this provision.[110]

(D) What if another law strikes down the contract?

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[105] N 2, 1873 (para 34-020).
[106] N 2; Council (EU), 'Common Position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II")' 9751/06, 11 August 2006.
[107] Commission (EC), 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")' COM (2003) 427 final, 21 (22 July 2003).
[108] Comment d, 730.
[109] F Scoles and others, *Conflict of Laws* (Hornbook Series, 4th edn West Group, St Paul Minn 2004), 1043-1045**.** In an earlier article, 'Unjust Enrichment in the Conflict of Laws : A Comparative View of German Law and the American Restatement 2d' (1978) 26 *Am J Comp Law* 1, 44, Hay doubted whether the wording of § 221(2)(a) covered 'supposed' relationships, although he was in favour of such an extension.
[110] *Alaska Airlines v United Airlines Airlines* (n 87).

It has sometimes been asked whether, if the contract is void under a law other than the putative governing law of the contract, should the aftermath be governed by this law or the putative governing law? A number of academics support application of the law which nullifies the contract to the restitutionary consequences.[111] Certain comments by Jenkins LJ could also be construed as supporting this conclusion. His Lordship has stated, without elaboration, that it would be 'logical' to look at the law which renders a contract void for the consequences of such voidness.[112] Examples of situations where the contract is struck down by a law other than the putative governing law are where one of the parties lacks capacity to enter into that particular contract; the contract is void owing to a failure to fulfil formal requirements; or the contract is void as being against the public policy of the forum. For ease of discussion, the last situation will be focussed on here in examining whether the putative governing law should continue to play a central role in these circumstances. However, the arguments of principle made below apply equally to the other situations where a law other than the putative governing law of the contract deems the contract void.

As mentioned above, one of the advantages of having the putative governing law of the contract govern both matters relating to establishing voidness and matters relating to the aftermath is that one system of law would govern matters arising from a unitary situation. Extension of this principle could mean that if the contract is void by a law other than the putative governing law, this law should also govern the consequences of voidness.

More significantly, if the contract is struck down because it is against the public policy of the forum, ignoring what the *lex fori* has to say about restitution in such a situation could detract from the purpose of the rule which struck down the contract in the first place. To put it in another way, allowing the *lex fori* to govern the consequences of voidness maintains the integrity of the

[111] Stevens (n 90); E Rabel, *The Conflict of Laws : A Comparative Study, Vol. 3* (2nd edn University of Michigan Law School, Ann Arbor 1964) 386; A Dickinson, 'Restitution and the Conflict of Laws' [1996] *LMCLQ* 556, 571; Panagopoulos (n 78) 145.
[112] *Arab Bank Ltd v Barclays Bank* [1953] 2 QB 527 (CA) 572; but note that this comment was *obiter* and that his Lordship refrained from giving a 'decided answer'.

rule which imposed the invalidity.[113] Otherwise, inconsistency could ensue. For example, if Ruritanian law governs the restitutionary aftermath of a contract void as being against English (forum) public policy, it may be that the contract would not be void under Ruritanian law itself. This would then mean that the restitutionary rules are framed against an 'incorrect' set of background assumptions and lead to a distortion of Ruritanian law. As Lord Penrose has observed : 'The scope for incompatibility between the grounds for nullifying a contract and the restitutionary remedies must be greater where they are the products of different systems of law.'[114]

English v Donnelly[115] is a case in point. In this Scottish case, the parties had chosen English law as the law governing the contract. This choice was held to be an illegitimate attempt to contract out of the Hire Purchase and Small Debt (Scotland) Act 1932, and hence, the contract was void. Lord Penrose commented that : 'It is hardly conceivable that the Scottish court would have proceeded to apply English law in resolving any quasi-contractual issues that had arisen between parties in the circumstances.'[116] While acknowledging that a restitutionary choice of law rule in favour of the putative governing law would have the advantage of certainty, his Lordship thought that such a rule would lead to substantial illogicality or injustice.[117]

Nevertheless, it is submitted that the grounds for applying the *lex fori* in this situation are not as strong as they would appear to be and that the application of the putative governing law, as opposed to the *lex fori*, is still the better choice of law rule. This can be illustrated by utilising an example : Let us assume that a contract for the sale of certain drugs is void under English law because they are classified as prohibited drugs. England is the forum but the contract is valid under the governing law of the contract, Dutch law, as the drugs are not prohibited under that law.

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[113] *Dicey, Morris and Collins* (n 2) 1876 (para 34-026).
[114] *Baring Brothers* (n 88) 124, although Lord Penrose went on ultimately to reject the appeal to consistency as being 'misleading'.
[115] 1959 SLT 2.
[116] *Baring Brothers* (n 88) 124.
[117] *Ibid.*

Money has changed hands and the defendant seller is faced with an unjust enrichment claim. It is suggested that in such a case, Dutch law as the putative governing law of the contract, and not English law, should govern the restitutionary obligation. The reasons will now be set out.

First, one must be careful not to make the leap into assuming that just because the contract offended forum public policy, the consequences from the failure of the contract would too. This, it is suggested, would rarely be the case because it is arguable that the interest of the *lex fori* in this situation is limited to the finding that the contract is void. The heart of the issue in the aftermath is in whose hands the money or goods should end up. That being so, it is not clear whether it would be less objectionable from the *lex fori*'s point of view if restitution is allowed or rejected. To return to the example above, in English eyes, both parties are guilty of making an illegal contract. Although English law would have a preference as to which result should prevail *if* it was also the governing law of the unjust enrichment claim, it is suggested that English law may not be offended if application of Dutch law either upholds or denies the restitutionary claim to the purchase price.[118] This is because in neither case could it be said that the English policy against upholding the validity of contracts for the sale of prohibited drugs has been undermined. The policy was directed primarily at the contract itself, not the movement of any monetary enrichment that resulted from the contract.

What if Dutch law concludes that restitution is not available because, as there is a valid contract under its law, there is no 'unjust' enrichment? In this case, unless English law concludes that this result would be against its public policy and applies English law to grant restitution, the claimant could be left without any remedy. To deal with this situation, one must be clear of the exact role to be played by the proper law of the restitutionary aftermath. It is suggested that the question here is to ask of Dutch law : 'given that the contract is void, should restitution follow?'

[118] If the result offended English public policy, then only in that subsidiary role should English law be allowed to have a say as to the restitutionary consequences; see text to n 121.

and not, 'on these facts, should restitution follow?'[119] The role of Dutch law here is merely to determine the availability of any restitutionary remedies. The contract's voidness is already established and there is no basis for Dutch law revisiting this question. Some may raise the counter-argument that this stance would lead to a distortion of Dutch law and amount to the application of a law that no other state might apply. This is an unfortunate drawback, but at the same time, one must remember that the role of the proper law of the restitutionary obligation is to determine whether such an obligation exists, not consider anew the validity of the contract giving rise to the unjust enrichment claim.

Secondly, for those who insist that there is an unbroken bond between the law which strikes down the contract and the law governing the aftermath of voidness, it should be noted that the question of the contract's voidness is primarily answered by the putative governing law.[120] The *lex fori* only plays what is arguably an incidental role in striking down the contract; that is, when the putative governing law leads to an unacceptable result, the secondary law, the *lex fori*, steps in. By analogy, it is suggested that the restitutionary consequences arising from the voidness should also primarily be for the putative governing law of the contract. There is no strong reason for promoting the *lex fori*, which has only played an incidental role in the first part of the equation, to play the primary role in the second part of the equation, that is, the aftermath of voidness.

This, however, is not to say that the public policy of the forum has no role to play here. As *per* normal, English public policy is relevant in a subsidiary capacity : if application of the relevant foreign law, in this case the putative governing law, to the restitutionary aftermath leads to a result which is against forum public policy, then and only then should the *lex fori* step in to

[119] Phrasing from R Stevens, 'Restitution and the Rome Convention' (1997) 113 LQR 249, 251.
[120] Article 8(1) of the Rome Convention.

disapply the offending rule.[121] Thus, it is suggested that in *English v Donnelly*,[122] English law as the putative proper law should have been applied to any restitutionary claim that may have arisen, with Scottish law only having a role to play if the result of applying English law to the restitutionary consequences was against the public policy of Scotland.

Thirdly, to advocate that the *lex fori* should govern the aftermath of a void contract would diminish the independence of the restitutionary claim. This stance would arguably be tantamount to treating the restitutionary claim as only ancillary to the question of establishing the contract's voidness, which is classified as a contractual matter.[123] For example, Brereton contends that in at least some cases where the law which renders the contract void is not also the law which governs the contract : 'the basis for nullity will also preclude restitution, irrespective of the law which would apply to the restitution claim. If this is so, choice of law is irrelevant.'[124] With respect, choice of law *is* relevant here; the question as to whether restitution should be allowed is a question which should be answered by the law governing the restitutionary obligation and not, as Brereton assumes, by the law under which the contract was adjudged void. The proper law of the restitutionary obligation may or may not decide that the basis of nullity precludes restitution. The important point is that it is for this proper law so to decide, not the law which establishes nullity. To promote the *lex fori* as the preferred choice of law rule to govern the restitutionary aftermath when the contract is void as being against forum public policy is to give too little weight to the independence of the law of restitution.[125]

Fourthly, in the admittedly exceptional case where more than one legal system renders the contract void, a choice of law rule in favour of the law striking down the contract would not

[121] It is suggested that this would be a fairly rare occurrence for reasons set out above, text to and directly after n 118. For an argument in favour of a more extensive role for the public policy of the forum, see S Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20 UQLJ 1.
[122] N 115.
[123] The question of the contract's validity falls within the scope of the Rome Convention, Article 8(1).
[124] N 3, 169.
[125] It is interesting to note that some would turn this argument on its head. They might argue that to advocate the application of the putative governing law of the contract to the restitutionary aftermath actually undermines the independence of the restitutionary claim as the putative governing law is the choice of law rule for contractual claims. This argument has already been dealt with; see text after n 79.

work.[126] For example, if the contract is void because it is against the public policy of the *lex fori* and one of the parties lacks capacity by his or her own personal law, there would be two competing systems of law to apply to the aftermath.[127]

Thus, even if another law strikes the contract down, it is argued that the putative governing law of the contract remains the most appropriate law to govern any personal unjust enrichment claims arising in the aftermath of a void contract.

(E) Conclusion to Section III

One could argue that in cases of void contracts, the putative governing law of the contract has little to do with the restitutionary claim because the contract is non-existent. However, it is unnatural to divorce the void contract from its restitutionary aftermath. Restitution takes place precisely because the contract is void and the reality is that the void contract provides much more than just a background to the consequential restitutionary claim. The circumstances surrounding the purported creation and failure of the 'contract' are the very circumstances that help to constitute the unjust enrichment claim. Thus, it has been seen above that the putative governing law of the contract continues to play a central role in relation to the restitutionary consequences of a void contract.

IV. OVERALL CONCLUSION

One of the themes of this paper is that there has to be a recognition of the impact that pragmatic considerations should have on choice of law formulations. This is particularly acute in the area of

[126] TW Bennett, 'Choice of Law Rules in Claims of Unjust Enrichment' (1990) 39 ICLQ 136, 161; Zweigert and Müller-Gindullis (n 77) 15 (para 29); Stevens (n 119) 253.
[127] Similarly, if both parties lack capacity by each other's (different) personal laws, it is unclear which party's personal law should be applied to the aftermath.

void contracts as they produce complex and controversial choice of law issues. The key to the conundrums raised by void contracts is the putative governing law of the contract. Despite its inherently illogical nature, it offers a pragmatic solution to the logically intractable problems that arise when one deals with void contracts. However, at the same time, it is important to have choice of law rules that are grounded on sound theoretical reasoning and which operate fairly between both parties. This is another theme pursued in this paper. Despite the paradoxical subject-matter, it is hoped that this paper has illustrated that it is possible to devise solutions which do justice to the twin virtues of logic and pragmatism.